BRB Nos. 09-0252
and 09-0252A

R.F.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CSA, LIMITED	)	DATE ISSUED: 09/30/2009
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross appeals the Decision and Order Denying Benefits (2007-LDA-0142) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial

evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In July 2004, claimant contracted to work for employer in Kuwait as a digital imaging specialist, and in July 2005, he renewed his contract for another year. Claimant has a history of treatment for depression and anxiety. While in Kuwait, claimant continued to take his previously-prescribed medication for those conditions. Claimant also has a history of undergoing cosmetic dermatological treatments and procedures. He has been diagnosed as being obsessed about his skin. Jt. Ex. P. While in Kuwait, claimant sought and received treatment for "wrinkles, evenness of complexion, laser hair removal, [and] things like that. . ." Tr. at 21-22. In December 2005, he sought treatment at the Obaji Clinic for facial skin care, and as a part of the treatment, he used a chemical peel. He testified that, on or about December 23, 2005, after working outside, he noticed his skin had turned red and was "riddled with lines."[1] Tr. at 22-24, 27, 40-42; Dep. at 53-60. According to claimant, he "freaked out," sought dermatological treatment from doctors in Kuwait,[2] which was unsuccessful, and requested permission to return to the United States for treatment with his own dermatologist. Despite his alleged emotional state, on December 31, 2005, claimant gave employer his 30-day notice of termination and continued to work during that period. Upon returning to the U.S., claimant saw a number of dermatologists and mental health care professionals for treatment.

Claimant filed a claim for temporary total disability benefits from February 1, 2006, through May 1, 2007, claiming he was disabled due to his skin disorder, anxiety, and stress disorder. Jt. Exs. A-B; Tr. at 8-10. Claimant alleged that the chemical peel caused a physical injury which in turn caused his psychological injury. He asserted that the "zone of special danger" doctrine brings his injury within the course and scope of his employment. Employer argued that any damage to claimant's skin was caused by the chemical peel and use of the chemical peel was not related to his employment. Tr. at 8-10.

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[1]Claimant testified that he went to the Obaji clinic and was prescribed a five-product system that included a chemical peel but was not told he should stay out of the sun. Tr. at 22-23. Claimant stated that, after using the peel, his skin got red and when he went in the sun, his skin began "buckling and tearing down." He also testified that he was in the sun a lot during December 2005 photographing Christmas events. Tr. at 24. Claimant stated that his skin and mental health got worse during the last month he was there and that although the redness went away, the skin "buckled," "got really heavy lines," and his "glands started to stick out." Tr. at 25-27.

[2]There are no records of this alleged treatment.

The administrative law judge addressed the issue of whether claimant sustained an injury pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2),[3] encompassing a discussion of the zone of special danger doctrine. In so doing, the administrative law judge noted that the doctrine "presumes virtually all injuries incurred by defense department contract employees overseas are employment-related, unless the injuries were neither reasonable nor foreseeable." Decision and Order at 15 (parenthetical omitted). Based on claimant's testimony that he applied a chemical peel and that the doctor did not explain the product well, the administrative law judge stated:

> Presuming, then, that the Claimant was injured as a result of the use (or possible misuse) of a dermatological product such as a chemical peel, I find that the link between his employment and any injury would be established. There is no evidence in the record to establish that any use of a chemical peel constituted misconduct. I also find that injury as a result of a misapplication of a dermatological product prescribed by a physician in a foreign country is reasonably foreseeable.

Decision and Order at 15. The administrative law judge explained that claimant's actions were foreseeable because: claimant's presence was required in Kuwait, claimant sought medical care in Kuwait and there is no evidence this was from an unlicensed physician, claimant's contract did not prohibit his seeking local medical treatment, and claimant's contract did not indicate he is entitled to military medical treatment. *Id.* Therefore, the administrative law judge found that the zone of special danger doctrine applies to link any injury claimant may have with his employment. In essence, the administrative law judge found that claimant satisfied the "working conditions" element of his *prima facie* case.

The administrative law judge next considered whether claimant, in fact, sustained an injury. The administrative law judge found that claimant, who is highly familiar with dermatological care, did not sustain a physical injury as alleged. She found that claimant blamed the alleged damage on the chemical peel but refused treatment offered by employer and remained in Kuwait for the additional 30 days, continuing to perform his work. The administrative law judge found that claimant's doctor's notes in May 2006 do

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[3]Section 2(2) of the Act states:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

not describe any abnormality, harm or injury to support claimant's assertion but, instead, indicate that the doctor observed no injury.[4] The administrative law judge specifically questioned why claimant, who contended he was in such emotional distress, did not return to the United States immediately or accept employer's offered treatment. Thus, she found that claimant did not sustain any skin injury. Having found there was no physical injury as asserted, the administrative law judge found that claimant did not establish that any mental health injury he may have suffered was "caused by or linked to his employment." Decision and Order at 18. In the absence of a physical or a psychological injury, the administrative law judge found that claimant did not establish the "harm" element of a *prima facie* case, and she denied benefits. Decision and Order at 16-18.

Claimant appeals the denial of benefits, contending the administrative law judge did not properly apply the Section 20(a), 33 U.S.C. §920(a), presumption. Specifically, claimant asserts that his evidence is sufficient to invoke the presumption with regard to a psychological injury and that employer failed to rebut the presumption. BRB No. 09-0252. Employer responds, urging affirmance. Employer cross-appeals the decision, contending the administrative law judge erred in finding that the zone of special danger doctrine applies to link any alleged injury to claimant's employment. Claimant responds, urging affirmance of the application of that doctrine. BRB No. 09-0252A.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Harm

In this case, claimant alleged he sustained work-related mental anguish and disability for a finite period of time due to work-related physical skin damage, and he seeks disability and medical benefits. Claimant contends on appeal that the

[4]The administrative law judge stated that the majority of the medical reports are illegible and, therefore, do not assist claimant in establishing injury. Decision and Order at 10-11, 17.

administrative law judge erred in finding that he does not have psychological harm and in requiring him to establish he sustained a work-related physical harm in order to establish the existence of psychological harm.[5] Claimant correctly asserts that a psychological injury, with or without an underlying physical harm, can constitute a "harm" under the Act, satisfying that prong of his *prima facie* case. *See American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964); *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997) (McGranery, J., dissenting), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (Brown and McGranery, JJ., dissenting). A psychological condition does not need to have been caused by a claimant's being subjected to "greater than normal stress;" rather, it is the effect of the events on the particular claimant that is significant.[6] *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

Claimant has presented evidence of a psychological harm. Claimant's psychologist, Dr. Denning, testified that she diagnosed claimant with depression, anxiety and attention deficit disorder. She stated that while claimant has a history of these conditions, the "trauma" that occurred in Kuwait in this case triggered claimant's changed self-image: he dressed as though he was damaged and he kept his face covered.[7] Dr. Denning opined that claimant was disabled between 2006 and 2007 due to his physical appearance and presentation of himself, and she diagnosed him with post-traumatic stress disorder. Jt. Exs. F; P at 11, 18-36. Dr. Long, a psychiatrist, diagnosed claimant with depression, anxiety, panic attacks, and obsessing. In March 2006, he stated

[5]Claimant does not challenge the administrative law judge's finding that he did not establish any physical harm. Decision and Order at 17-18.

[6]For working conditions to be "stressful" to a claimant, they need not be circumstances universally recognized as "stressful;" they need only be occurrences that are stressful to that claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). It is his reaction to the conditions and events that is relevant. *Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994). Employers must accept "the frailties that predispose" their employees to injury. *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-148 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979).

[7]Despite stating that claimant's appearance was relevant to his mental well-being, Dr. Denning did not take note of claimant's appearance. She stated that the physical damage need not be real, as she saw the psychological results of what claimant perceived to be true. She did note, however, the claimant is obsessed with his skin. Jt. Ex. P at 12-14, 39.

claimant is preoccupied with his skin and demonstrates some paranoia. Dr. Long reported that claimant was much improved by May 2006. Jt. Ex. G.[8]

As the only two doctors who addressed claimant's mental state diagnosed him with some type of psychological condition, the evidence is undisputed that claimant had a psychological harm during at least a portion of the claimed period. Although the administrative law judge discredited claimant's testimony regarding his "having a breakdown" between the time he discovered his alleged physical injury and the time he left Kuwait, Decision and Order at 18, the injury need not occur immediately. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). Thus, we reverse her finding that claimant did not establish the "harm" element of his *prima facie* case as there is uncontradicted evidence in the record demonstrating that claimant sustained some type of psychological injury during the period of claimed disability. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

Working Conditions

Claimant also must establish the occurrence of an accident or the existence of conditions at work that could have caused his harm. Claimant contends his psychological condition was aggravated by the damage to his face, real or perceived. He asserts no other accident or working conditions as a cause of his distress. "Damage to claimant's face" is not a "working condition" *per se*. The administrative law judge found that the zone of special danger doctrine applies to satisfy the working conditions element, *i.e.*, if claimant had sustained physical harm to his face from the chemical peel, the zone of special danger doctrine would have brought that harm within the course and scope of his employment. Decision and Order at 15. Employer challenges this finding. Employer asserts that to the extent claimant ever had any skin damage, it was related to his use of a chemical peel which was so attenuated to his employment that the zone of special danger doctrine should not apply.

In cases arising under the Defense Base Act, as here, the Supreme Court has held that an employee's injury may be deemed to have occurred within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) (benefits awarded where employee drowned while attempting to rescue two men in a dangerous

[8]The administrative law judge found Dr. Long's hand-written reports "difficult to decipher" and she learned from them only that claimant had a skin issue, was prescribed medications, and saw Dr. Long on a quarterly basis. Decision and Order at 10.

channel near the recreational facility in Guam); *see also Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965) (benefits awarded where employee was killed in car crash returning from town on San Salvador Island); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965) (benefits awarded where employee drowned during weekend outing away from job); *Kalama Services, Inc. v. Director, OWCP [Ilaszczat]*, 354 F.3d 1085, 37 BRBS 122(CRT) (9th Cir.), *cert. denied*, 543 U.S. 809 (2004) (benefits awarded for injury that occurred during socializing hours on Johnson Atoll). The Board has defined the "zone of special danger" as "the special set of circumstances, varying from case to case, which increase the risk of physical injury or disability to a putative claimant." *N.R. v. Halliburton Services*, 42 BRBS 56, 58 (2008) (McGranery, J., dissenting); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988) (benefits awarded where employer approved cocktail party hosted by claimant and he was injured during overnight stay). The Board has also stated that the purpose for the zone of special danger doctrine is "to extend coverage in overseas employment such that considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment." *N.R.*, 42 BRBS at 60 (citing *O'Leary*, 340 U.S. at 506; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 481 (1947)). However, if an employee becomes so thoroughly disconnected from the service to the employer that it would be unreasonable to say that the injury occurred in the course of employment, the activity may not have occurred in the course of employment and his employer would not be held liable for any resulting injuries. *O'Leary*, 340 U.S. at 507;[9] *Gillespie v. General Electric Co.*, 21 BRBS 56 (1988), *aff'd*, 873 F.2d 1433 (1st Cir. 1989) (table).

In *Gillespie*, a widow sought death benefits under the DBA after her husband accidentally hung himself during autoerotic sexual activity. The administrative law judge found that the decedent's separation from his family, due to his work overseas, created a zone of special danger for him, loneliness, and awarded benefits. The Board reversed, holding that the decedent's behavior deviated so far from his employment that it would be unreasonable to find that his activity occurred within the course of employment. *Gillespie*, 21 BRBS at 57-58.[10] In contrast, in *N.R.*, an employee assigned to Camp

[9]In *O'Leary*, the Supreme Court stated that the rescue attempts were not "the kind of conduct that employees engage in as frolics of their own." *O'Leary*, 340 U.S. at 507.

[10]In *Kirkland v. Air America, Inc.*, 23 BRBS 348 (1990), a widow implicated in her husband's murder in Laos was denied benefits on the basis that a spouse committing murder cannot benefit from the deed. Although the Board stated that the claimant's actions severed any causal connection between the decedent's death and his employment, 23 BRBS at 349-350, it also specifically declined to address the zone of special danger argument. *Id.* at 353 n.6.

Eggers in Afghanistan took an unauthorized trip off-base in order to procure non-military transportation to the United States, as he alleged working conditions were unsafe. When he returned, employer and the military commander ordered claimant to be detained for immediate removal to Bagram Air Base to await a military flight to the United States. Claimant asserted that the trip to the base was unsafe and repeatedly refused to go. Military police tried to restrain claimant and get him into the transport vehicle. Claimant sustained injuries when he resisted their efforts. *N.R.*, 42 BRBS at 61. The Board held that, although claimant was at fault for the altercation, fault is irrelevant to entitlement under the Act, and the dispute which led to his injuries "had its genesis in his employment." *Id.* Accordingly, claimant's injuries fell within the zone of special danger.

We hold that claimant's use of the chemical peel in this case was personal in nature and did not have its genesis in his employment, making the zone of special danger doctrine inapplicable. It is undisputed that claimant has a long history of undergoing cosmetic skin treatments, and he has been diagnosed as being obsessed with his skin. Claimant unequivocally stated that he sought multiple skin treatments in Kuwait.[11] He stated that a friend recommended that he go to the "well-known" Obaji clinic, and claimant did so to try to even out his complexion. Tr. at 22-23. This treatment included the use of a chemical peel which resulted in claimant's perceived skin damage. Use of the chemical peel was not "rooted in the conditions and obligations of his employment," or in any way related to the fact that claimant was employed in Kuwait. *N.R.*, 42 BRBS at 61; *see also Gillespie*, 21 BRBS at 58.

As claimant's use of a chemical peel for cosmetic skin treatment is so thoroughly disconnected from his service to employer and did not have its genesis in his employment, we reverse the administrative law judge's determination that the zone of special danger doctrine applies to connect claimant's perceived skin injury to his employment. *Gillespie*, 21 BRBS at 58. As the doctrine does not apply, claimant has failed to establish working conditions that could have caused his perceived skin damage and, in turn, his psychological harm. Absent satisfaction of the working conditions element, Section 20(a) cannot be invoked. *Gillespie*, 21 BRBS at 58; *see also U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Accordingly, we affirm the administrative law judge's denial of benefits, albeit for the reasons set forth herein and not for those given by the administrative law judge.

[11]He saw dermatologists for wrinkles, uneven complexion, laser hair removal, and laser removal of age spots. Tr. at 21-23.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge